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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:
DANIEL O. TOMLIN, JR.,

Debtor.

Case No. 99-35175-BJH-7

ROBERT MILBANK, JR., TRUSTEE

Plaintiff,

VS.

Adversary No. 01-3458

DANIEL O. TOMLIN, III, et al.,

Defendants.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON BIFURCATED TRIAL TO DETERMINE DEFENDANT
JUDY TOMLIN'S OWNERSHIP IN LAND ADVISORS, INC.**

The issue before the Court in this bifurcated trial is whether Defendant Daniel Tomlin, Jr. (the "Debtor" or "Tomlin"), has a community property interest in Land Advisors, Inc. ("LAI") through his wife, Defendant Judy Tomlin (the "Defendant"). The Defendant claims that she owns her interest in LAI as her separate property. The Trustee alleges that this interest is community property and therefore is "property of the estate" under 11 U.S.C. § 541. This is a core proceeding under 28 U.S.C. § (b)(2)(A), (L) & (O), whereby this Court can issue a final order. Furthermore, in addition to this Court having exclusive jurisdiction over "all of the property, wherever located, or the debtor as of the commencement of such case, and of the property of the estate," 28 U.S.C. § 1334(e), this bifurcated trial is an equitable proceeding similar to the Chancery Courts of England in 1789. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989).

The Defendant acquired her ostensible ownership of LAI during her marriage to the Debtor. Therefore, as The Defendant acknowledges, under Texas law her interest is presumptively community property unless she can trace her ownership to separate property. The

Defendant further acknowledges that she has the burden of proving her separate property interest by “clear and convincing evidence.” The Defendant argues that she has met this burden.

This Court heard three days of testimony at trial, and has had an opportunity to observe the demeanor of the witnesses and to judge their credibility. The Court has also reviewed numerous exhibits offered by the parties.

The conclusion from all of the credible evidence is that the Defendant’s ownership of LAI was structured to appear as if she acquired the stock as separate property during her marriage, an illusion structured by the Debtor and his attorneys. In any event, the Defendant has not proven by “clear and convincing evidence” that the stock is her separate property. Accordingly, LAI is the community property of the Debtor and the Defendant.¹ Moreover, since the Defendant’s ownership of LAI is not “sole management community property” within the meaning of TEX. FAM. CODE ANN. § 3.102 (Vernon 1998), her ostensible ownership is “property of the estate” within the meaning of § 541 and must be turned over to the Trustee.

FINDINGS OF FACT

“Oh, What A Tangled Web We Weave, When First We Practice To Deceive!”:² Debtor’s Prior Company, TPI, Debtor’s Financial Troubles and the Formation of LFA and LAI

1. In the mid to late 1980’s, the Debtor controlled a real estate investment company called Tomlin Properties, Inc. (“TPI”). At all relevant times, the Debtor owned either 97% or 100% of TPI and completely controlled all aspects of the company.

2. The Debtor/TPI’s business was the acquisition of land for investors. In return for identifying investment opportunities and putting together “deals,” TPI and/or the Debtor earned a fee when the property was acquired and another fee when the property was ultimately sold.

3. By the late 1980’s, the Debtor/TPI had under his control approximately 400 million dollars of land investment deals from which he could ultimately earn millions of dollars in future fees. The value of these fees were not included on the Debtor’s balance sheet, but were

¹ During the trial, the Court was apprised of the conversion of LAI into a new company, Land Advisors, Ltd. From the testimony, Land Advisors, Ltd is the successor to all of the assets and liabilities of LAI and has the same ostensible ownership. Therefore, these findings of fact and conclusions of law also determine the community property rights of the Debtor and the Defendant in the successor entity as well, or any subsequent successor entity to Land Advisors, Ltd. that may have been formed between the time of the trial and the entry of these findings and conclusions.

² SIR WALTER SCOTT, MARMION, canto vi, stanza 17 (1808).

valued in notes to his financial statements prepared sometime after January 1988 at approximately 20 million dollars.

4. While building his business and amassing these valuable contract rights, the Debtor, using personal guarantees, borrowed millions of dollars from federally insured depository institutions. When the real estate market soured and his source of new capital dried up, Debtor defaulted on many of these loans. Debtor's bankruptcy schedules reflect over 35 million dollars of judgments obtained against him in the late 80's and early 90's.

5. By 1989, although the Debtor owned and controlled significant assets, he was insolvent. As a result, the Debtor devised a scheme, with the assistance of his attorneys and long-time trusted associates, to continue his business while avoiding his creditors.

6. Central to this scheme was the Debtor's plan to transfer all of his essential business assets to new entities. These new entities would ostensibly be owned by the Defendant (who is and was a homemaker and who, to this day, has had virtually no involvement with the business) and the Debtor's children (Defendants Debra Brock, Dena Tomlin and Daniel Tomlin III ("Tomlin III"), aged 22, 19 and 24, respectively, at the time), neither of whom had or has any in-depth knowledge about the business.

7. In furtherance of his plan, Debtor incorporated two new entities, Land Financial Advisors, Inc. ("LFAI") on July 10, 1989, and Land Advisors, Inc. ("LAI") on May 25, 1990. LFAI was facially owned 10% by Debtor and 90% by the Defendant and the Debtor's children. LAI is facially owned 100% by the Defendant and the Debtor's children.

8. First LFAI, and then LAI, took over all of the employees and business assets of TPI. The Companies' initial capitalization consisted of \$4,000 from the sale of stock to the Defendant and the Debtor's children (\$2,000 for each company), the transfer of \$333,000 in cash commissions from a transaction referred to as the Fontana deal (which commission belonged to TPI and/or the Debtor), and the transfer of other valuable intangible assets, including commission rights and profits interests in various real estate joint ventures and other valuable business opportunities. Ultimately, in the ensuing years, much of the revenue earned by LFAI and LAI was derived from deals that were originally assets of the Debtor/TPI.

9. Shortly after the formation of LFAI, the Debtor became "worried" that his 10% ownership of LFAI would create problems for the success of his scheme. Eventually, LAI took over all activities and employees, and LFAI was abandoned in favor of LAI.

10. For all intents and purposes, LAI and LFAI were essentially the same company. While both entities existed in legal form side by side for a brief time, the owners and employees themselves treated the two entities as one. Employees received their paychecks first from LFAI and then LAI, but in fact did not distinguish the companies. The companies' accounting records blended the two companies. "Back wages" accrued during the late 1980's and early 1990's under the auspices of TPI and LFAI were ultimately paid by LAI. The Defendant, an ostensible owner of both companies, apparently did not even realize that separate companies had been incorporated.

11. During the late 1980's, and continuing through the 1990's Debtor was represented by counsel in connection with his financial difficulties. His counsel in connection with many if not most of these matters was the law firm of Hunter, Van Amburg & Wolf (in particular, attorneys Bill Hunter, Bill Wolf and Craig Henderson).

12. Bill Wolf and Craig Henderson are currently with the firm of William Wolf, PC, which was counsel to the Defendant in this trial.

13. The work of incorporating and forming the new companies was handled by employees of TPI, primarily Phillip Bivona and Roger Lindsey ("Lindsey"), under the Debtor's direction, along with the Debtor's above-referenced outside counsel, primarily Craig Henderson.

14. All decisions as to the structure of the new entities, including whom would be issued shares, and in what percentages, were made by the Debtor.

15. Once formed, the Debtor continued to control all aspects of LFAI and LAI, just as he did at TPI, and continued to do so even at the time of trial.

16. At trial, the Defendant denied that the Debtor had anything to do with the formation of the new companies and in fact claimed that they were formed because she and her son "always wanted [their] own company." This testimony was not credible and conflicts with virtually all of the circumstantial and other evidence.

17. Ken Houston was a Vice-President of TPI, LFAI, and LAI. His last day of official employment was January 3, 1991, although he remained at the offices until March 3, 1991.

18. By the time the new companies were formed in 1989 and 1990, Houston had been a senior employee of TPI for over 6 years, reporting directly to the Debtor. He was the only non-family member that was made an officer (vice-president) of LAI.

19. Mr. Houston was essentially in the position of an eyewitness to the events and transactions occurring with respect to the formation of the new companies in 1989 and 1990, and was in a good position to observe the interaction among the employees of the company.

20. Mr. Houston was an unbiased witness who gave believable and credible testimony.

21. According to Mr. Houston, although the name of his employer entity changed during the period of his employment, beginning with TPI and “evolving” into LFAI and then LAI, these new companies were, for all intents and purposes, the same company as TPI. According to Mr. Houston, “nothing changed,” after the formation of the new companies, and he continued at all times to report to the Debtor who remained at all times in total control of each of the entities.

22. Helga Loftin (“Loftin”), the Debtor’s secretary and a long-time employee of the Debtor’s company described the transition from TPI to LAI similarly. “One day [she] was working for Tomlin Properties and the next day [she was] working for another company . . . [She was] at the same desk doing the same thing and nothing changed.”

23. During the late 1980’s and early 1990’s, Mr. Houston had many conversations with the Debtor about the financial distress being experienced by TPI and had conversations with the Debtor about the formation of LFAI and LAI. During these conversations, the Debtor advised Houston that because of the financial difficulties the company was experiencing, and in order to “hide and shield debts” from creditors, a new company would be formed to continue the operations of TPI under a new name. The Debtor explained to Houston that “nothing would change” but the name. According to Houston, the objective was understood to be the creation of a moving target for creditors, which he described as akin to a game of “three card monty” or “hide the pea.”

24. During the entire time of Houston’s employment, through and including his termination in January 1991, the Debtor made all key decisions for each of the entities.

25. Neither the Defendant nor Tomlin III made any real business decisions related to the companies during the time Houston was employed (i.e. through the beginning of 1991). The Defendant did not attend any of the meetings.

26. The Debtor was the person who made the decision to terminate Houston and was the person who communicated that decision.

27. Based on his personal observations and knowledge of the circumstances through the beginning of 1991, Houston believed that the Debtor was the owner of LAI when it was formed in 1990.

28. The only basis for the Defendant's claim that she (and her children) are the sole owners of LAI (to the exclusion of the Debtor) is the fabricated internal documentation of the company (i.e the share transfer record, certificates, and organizational minutes). The originals of all of the share certificates were still in the corporate book when the Defendant's deposition was taken in April 2002.

29. The Defendant did not provide any proof that her ownership (or that of her children) was ever represented to a third party. In fact, the Defendant testified that she is aware of no instance in which she represented to any third party that she owned LAI.

30. The evidence indicates that the Defendant and the Debtor's children acted in a manner inconsistent with the position that they genuinely owned stock in LAI.

31. Then Defendant did not list her ownership of LAI on any financial statements, including loan applications that requested a list of all assets including shares of stock.

32. Both Deborah and Dena Tomlin, the daughters of the Debtor and the Defendant, are listed as the owners of 20,000 shares of common stock each on LAI's internal records. However, neither daughter has ever listed this ownership on any financial statement or loan application. Both daughters purchased homes and submitted sworn loan applications in connection therewith during the time of their ostensible ownership of LAI. Yet, despite the fact that these sworn applications included a requirement to list all assets, including any stock, owned by the applicant, neither daughter included any reference to their ostensible ownership of 20,000 shares each of LAI.

33. The omission by Defendant and her children of any indication of their ownership of LAI from financial statements provided to third parties is indicative of the fact that they did not own or claim ownership of stock in LAI.

34. Evidence of Dena Tomlin's awareness that her ostensible ownership was a sham is found in Trustee's Exhibit 74. Prior to the submission of her loan application, Dena Tomlin wrote the Debtor a handwritten memo asking for assistance in completing the application. In this memo, she asks "DAD" "if" she was an owner of Land Advisors. A few weeks later she

submitted a sworn application to a federally insured institution omitting any reference to her ostensible ownership of LAI.

35. Lindsey testified that he specifically advised Dena Tomlin, as well as Tomlin III, not to list their ownership of LAI on sworn financial statements because it had no value. While this testimony demonstrates that the children's omissions of their ownership of LAI was intentional, the explanation proffered by Lindsey for this omission was not credible. Lindsey, as the company controller, was well aware that LAI had generated millions of dollars of income over the years. Moreover, on the 1999 balance sheet and profit and loss statements (i.e. the most recent statements prepared before the submission of Dena Tomlin's home loan application), the company showed almost \$5 million in income and almost \$2 million in net profit, as well as a book value of approximately \$4 million dollars. (Book value as of the end of 2001 is in excess of 5 million dollars). The Defendant and her daughter Dena Tomlin, had no conception of the ownership or value of LAI.

36. Until the year 2000, the tax returns for LAI were prepared by Phillip Bivona. Phillip Bivona had worked for the Debtor and his companies for many years, first as an in house accountant/CFO and then as an outside accountant. Now deceased, Phillip Bivona knew the details of LAI's finances.

37. From 1990 until 2001 when it became an issue in this litigation, LAI reported to the IRS on its tax returns that the Debtor was the 100% owner of LAI.

38. In September 2001, LAI filed its tax return for the year 2000. This return also represented that the Debtor owned 100% of the common stock of LAI.

39. The year 2000 return was prepared by the company's CPA, Brian Bivona, Phillip Bivona's son. Brian Bivona had previously done work assisting his father in the preparation of tax returns for investment partnerships managed by the Tomlin entities. Brian Bivona essentially took over his father's practice with respect to LAI and the Debtor sometime in 2001 when his father died.

40. At trial, Brian Bivona attempted to explain the representation on schedule E of the 2000 return as a carryover from prior years, resulting from the "rules of attribution under section 367 of the IRS Code." However, this explanation was not credible. On cross examination, when shown the 1999 return (which Mr. Bivona reviewed before he completed the 2000 return), he

acknowledged that the 1999 return did not have a similar representation on schedule E. Rather, the representation as to the Debtor's ownership of LAI on the 1999 return was on schedule K.

41. At Mr. Bivona's deposition, he was asked why he did not include a reference to Tomlin III (Debtor's son and the ostensible President and largest shareholder of LAI) on schedule E of the 2000 return (which asks for a list of all officers and their percentage ownership). Significantly, he responded that at the time he prepared this return he did not realize that Tomlin III was an officer of LAI.

42. That the company's own CPA did not even realize that Tomlin III was an officer of LAI is indicative of the true nature of the relationship between the Debtor, the Defendant and the Defendant's children, with respect to the ownership and control of LAI.

43. Lindsey, LAI's in-house controller, acknowledged that the tax return representations as to the Debtor's ownership of LAI was intentional. He reviewed each of the tax returns for accuracy before they were signed, and acknowledged his awareness of these representations. Indeed, Lindsey had multiple conversations with Phillip Bivona and Brian Bivona over the years about this matter. Lindsey further acknowledged that the representation was changed recently only as a result of it becoming an issue in this litigation.

44. The conflicting positions as to the Debtor's involvement and ownership is consistent with a pattern of behavior in which the Debtor, through his associates and family, played fast and loose with the characterizations of his role within the company depending on the audience. When dealing with creditors or this Court, the Debtor is a mere employee and does not have any ownership or control; but when dealing with potential investors, his family, senior employees, and the IRS, the Debtor is the controlling or principal owner of the company. He is the main man.

45. LAI has benefited from millions of dollars of tax losses from accrued interest deductions and net operating loss carryforwards attributable to Tomlin International Corporation, a wholly owned subsidiary of LAI which was formerly a wholly owned subsidiary of Tomlin Properties Inc., the Debtor's old company. This fact provides a plausible explanation why LAI repeatedly represented to the IRS that the Debtor was the 100% owner of LAI (i.e. in order to benefit from tax losses to which it would not have otherwise been entitled).

46. Another example of the way the Debtor played fast and loose with the characterization of his role in the new companies can be seen by comparing a copy of a June,

1990 fax from the Debtor to a third party describing LFAI, to a marked up description of the Debtor's former company, TPI. From a comparison of these documents, LFAI is described in identical terms to the prior description of TPI. Significantly, the Debtor alone (without any reference to the Defendant or the Debtor's children) is described as "the principal" of the company.

47. The Defendant was not forthcoming; her answers were often unresponsive and evasive and often did not comport with common sense. She claimed she never spoke with the Debtor about the formation of the company or the company's business. Yet the company is the Debtor's employer and the principal source of the family's livelihood. She also claimed she gave Tomlin III a gift of 25,000 shares of stock in LAI, but did not discuss the matter with the Debtor, Tomlin III's father and the principal employee of the company. She offered no explanation why she would keep this gift secret from the Debtor.

48. The Defendant's testimony also demonstrated a willingness to play fast and loose with what is separate and what is community. In response to a question about how she expected to finance the salaries of employees of the new company with only \$2,000 initial capital, she initially claimed that she funded the salaries of LAI employees with her own money. Her explanation of this statement, however, indicated that she was referring to the funding of the Debtor's former company with loans secured by household furniture. There was no evidence that the household furniture was the Defendant's separate property.

49. The Debtor was insolvent at all relevant times applicable hereto, including as of May 1989 (when the Defendant opened the "separate property" bank account at NCNB described below), on July 10, 1989 (the date of incorporation of LFAI), on May 25, 1990 (the date of incorporation of LAI), and on January 1, 1996 (the date that the Defendant allegedly gifted 25,000 shares of LAI stock to Tomlin III).

**The Defendant's Acquisition Of LAI
Stock Sets The Stage For The Tangled Web**

50. LAI was incorporated on May 25, 1990. On that same date, according to LAI's records, 100,000 original issue shares of stock (representing 50% of the total outstanding) were issued to the Defendant, purportedly as "her sole and separate property," and 100,000 shares were issued to the Debtor's children.

51. According to the Bylaws of LAI, shares of the company may not be issued until the full amount of the consideration has been paid. The Bylaws further provide that: "The consideration paid for the issuance of shares of the corporation shall consist of money actually paid, labor or services actually performed, or property, both tangible or intangible, actually received. Neither promissory notes nor the promise of services shall constitute payment or part payment for the issuance of shares of the Corporation."

52. The Defendant obtained her stock ownership in LAI prior to the actual payment of any money. Check number 1026 for \$1,000, which is the sole basis for her separate property claim in this case, was not written and delivered to LAI until at least two months later, sometime after it was dated on July 23, 1990. This check was deposited into an LAI bank account on August 8, 1990.

53. Lindsey testified that the share certificates were likely signed and issued within days of the date on the certificates (i.e. May 25, 1990).

54. The true consideration for the Defendants' receipt of stock ownership in LAI was not the after-the-fact payment of the nominal amount of \$1000, but rather the Debtor's substantial contributions of his labor and very valuable intangible assets. As of May 25, the Debtor had already caused the transfer of \$333,000 dollars of commissions to LAI's predecessor LFAI (which the handwritten notes of Lindsey demonstrate were considered by the company as income to LAI), all of the essential business assets of TPI, including all of its employees, licenses, business relationships, a management contracts, etc., and the potential to receive millions in future commissions.

55. On July 13, 1990 (still prior to the date of check number 1026 and any payment by Judy Tomlin for her stock), the Debtor signed a certification to the Texas Real Estate Commission, notarized on that same day. That certificate represented that the Debtor was "the corporate officer of [LAI] responsible for the day-to-day operations of the corporation," and that "LAI has complied with, and will continue to comply with, all statutes, rules and regulations required of it to conduct business in this state."

56. The Defendant has never acted in a manner consistent with that of a genuine shareholder of LAI, nor has she received any benefits of a shareholder.

a. At the time of her first deposition, she did not know if she was an officer of the Company.

b. She has never attended a shareholders meeting and she exhibited ignorance of some of the most basic knowledge about the company which a genuine shareholder would be expected to know. She evidenced no knowledge as to the business workings of the company or how it would finance its initial operations. This is particularly surprising since she claimed to be a founding shareholder that “always wanted to own her own company.

c. She could not explain why she was entitled to 50% of the company when it was formed, except to say that it was because she was the mother.

d. She was not aware of the Debtor’s role within the company, or whether he was an officer of the company.

e. She was not aware how much compensation the Debtor was receiving from the company, or any of the other officers, including Tomlin III, for that matter.

f. She was not aware that the company had generated millions of dollars of revenue over the years.

g. She was not aware of whether she was an owner or officer of LSR Development, Inc., a company set up in 1999 to deal with one of the most significant business opportunities of the company, the Lone Star Ranch in Frisco.

h. In fact, she apparently was not even aware of the name of the company and its existence until long after it was formed. The payee on the check which purported to be her initial capital investment in LAI was not filled out in her hand.

i. The Defendant worked for LAI as a receptionist for about a year, from the Spring of 1991 to the spring of 1992, receiving no compensation. By this time, the operating company employing all persons was either LFAI or LAI, yet the Defendant answered the phones “Tomlin Properties,” the name of the Debtor’s old company. Significantly, when describing this activity, she characterized that she “worked for free for a year for my husband.”

57. At the time LAI was formed, the Defendant had not previously been involved in the business of Tomlin Properties, and did not have any experience or training in real estate.

58. There is no evidence that the Debtor and the Defendant ever made any agreement (orally or in writing) to partition or exchange their community property in accordance with Texas

Family Code § 4.106, or that they ever elected to record a schedule of the Defendants' separate property as provided by Texas Family Code § 3.004.

**The NCNB Account And The
Changing Stories As To The Source of Funds**

59. On May 16, 1989, the Defendant opened a bank account at NCNB (the Preston and Mockingbird Road branch) with the designation "separate property account." An initial deposit of \$145,000 is reflected in the bank records and initial deposit slip. The Defendant did not produce any further documentary evidence about this deposit.

60. Although there is a place on the deposit slip to indicate the form of deposit (i.e. cash or checks), the deposit slip merely indicates the total amount of the deposit. The Defendant indicated that she did not remember whether the deposit was in the form of one or more checks, and she testified that the deposit may have included cash.

61. The Defendant refused to permit the Debtor to answer questions about discussions between the Debtor and the Defendant concerning the NCNB account on the ground they were subject to the Husband-Wife privilege. Given that the Defendant has the burden of proof with respect to proof of her separate property, the Defendant asserted this privilege at her peril. The reasonable inference in this case is that those discussions would reveal facts adverse to the Defendant's position.

62. The Defendant has given dramatically inconsistent testimony as to the source of funds in this account.

63. For almost two and a half years, the Defendant and her counsel repeatedly and aggressively asserted that the source of the funds in this account were from the Defendant's "inheritance."

a. On December 14, 1999, a few months after the filing of the Debtor's bankruptcy, counsel for Trustee met with the Defendant and her counsel to inquire about the existence of her separate property. The Defendant's counsel, in a pleading filed with this Court (and read into evidence at trial), characterized the assertions of the Defendant at the December 1999 meeting as follows:

Mrs. Tomlin in the presence of her own counsel (who is more than willing to testify to this issue) affirmatively stated that she owned stock in LAI as her separate property and proceeded to detail the tracing of such stock as separate property acquired by inheritance.

b. On April 16, 2002, the Defendant testified under oath as to the source of funds in this account. Her testimony on this point was as follows:

Q. Now I want to go back to the purchase of your stock in Land Advisors, Inc. Do you have a recollection of which of the two bank accounts you --

* * *

A. This one -- the first one you asked about.

Q. The one on Mockingbird?

A. Correct.

Q. Is that the account that you wrote the check for your purchase of stock in Land Advisors, Inc.?

A. Yes.

* * *

Q. What were the source of the funds in the Preston Road and Mockingbird account?

A. Inheritance and money from my mother.

Q. So how is that different than what you just told me about the Preston and Royal?

A. Different inheritance.

Q. A different inheritance?

A. Correct.

c. On October 17, 2002, the Defendant, through counsel, repeated the assertion that the source of funds for this account was "inheritance" in a pleading filed with this Court. Significantly, the Defendant's counsel at this time was not someone new to the facts. She was represented by Craig Henderson and Bill Wolf, the same counsel who have represented the Debtor in connection with the formation of LAI and advised the Defendant at the time the account was set up.

64. The Defendant's position at trial - that the source of funds in this account was the sale of jewelry that was gifted to her by the Debtor - appeared for the very first time in her second deposition in April 2003.

65. At trial, the Defendant attempted to explain her earlier testimony by claiming that there was "confusion" between her two different accounts. This explanation is not credible. Her testimony about "a different inheritance" indicates that she was aware of, and was consciously distinguishing between the two accounts. Moreover, the Defendant had multiple opportunities to make corrections or explain any confusion in her testimony prior to her second deposition, yet never took the opportunity to do so.

a. Shortly after testifying that the source of funds in the Mockingbird account was a “different inheritance,” she took a break and had a discussion with her counsel. Upon returning from the break, she was specifically asked if she wished to clarify any of her prior testimony and she declined, indicating her satisfaction with her testimony.

b. Toward the conclusion of the deposition, her own counsel proceeded to ask her questions in order to “clear up” her testimony, but asked no questions about the source of funds in the account.

c. Finally, the Defendant testified that she read the deposition transcript before signing and did not make any corrections.

66. The entire transcript of the Defendant’s deposition of April 2002 was admitted into evidence. A review of that transcript indicates that despite the fact that the Trustee’s counsel questioned the Defendant about the source of funds in the account, at no time did the Defendant mention the sale of jewelry (or any gifts from the Debtor for that matter) as the source of funds for that account. Indeed, notwithstanding the fact that she now claims that the Debtor made gifts to her of hundreds of thousands of dollars of jewelry, she made no mention of any substantial gifts from the Debtor at all. Her only mention of any kind of gifts as a source of funds was her reference to “inheritance and gifts from my mother and gifts of whoever would give me money.”

67. The Defendant’s testimony at her second deposition about the alleged sale of her jewelry to fund this account was quite vague and virtually impossible to verify. At this deposition, the Trustee’s counsel questioned the Defendant in an attempt to discover the identity of the person or persons who allegedly purchased the jewelry. In response, she testified that she did not know or could not recall who purchased this jewelry, she did not remember whether the jewelry was all sold to one person or to multiple persons, and she could not remember where the buyer or buyers were located. She did not even know if the buyer was a jeweler in Dallas. Indeed, the only person whose identity she admitted recalling in any fashion was a jeweler from Houston who she testified she did not believe was responsible for the purchase of the jewelry at issue. She also testified that she didn’t have a copy of any bills of sale, checks or other document reflecting the sale of the jewelry and she could offer no documentary proof that the proceeds of the alleged sale of jewelry went directly into the account.

68. The Defendant's testimony at her deposition about her lack of knowledge or memory of either the name or the location of the probable buyers of her jewelry was revealed at trial to have been untrue.

a. At trial, the Defendant admitted that, at the time of her deposition, she did indeed know that the person or persons who bought this jewelry was either 1) a jeweler located in Dallas at the corner of Lover's Lane and Preston Road (although she continued to maintain that she didn't remember his name until right before trial), 2) a Mr. Picetti, or 3) a Ms. Heller. The Defendant even testified at trial that she specifically remembered telling someone that the person to whom she thought she sold the jewelry might have been at the Lovers Lane intersection. And she testified that following the deposition she contacted Mr. Picetti, as well as a Ms. Heller, and even drove by the Lovers' Lane location where the other jeweler had been located.

b. The contrast between her testimony at trial and her prior testimony on this point is instructive. At trial she testified:

Q At the time of your depositions did you remember who you sold the jewelry to that was the sale responsible for putting \$145,000 in your separate property account?

A I knew it had to be either the man which I testified to at the corner of Preston and Lovers [in Dallas] which turned out to be Mark Pharo. I could not remember his name. I haven't seen him in 14 or 15 years and or perhaps Joe Pesetti (phonetics).

* * *

Q Your testimony was that you knew at the time that I questioned you under oath you knew that one of the people you might have sold the jewelry to was at the corner of Lovers Lane?

A Yes.

69. As a review of the entire deposition transcript admitted into evidence reveals, at no time did the Defendant mention the Lovers Lane address, or any other address or person, including Mr. Picetti or Ms Heller.

70. The majority of the funds deposited in this account were withdrawn in the form of checks made payable directly to the Debtor, who received at least \$109,000 from this account in 8 separate checks. The Defendant testified that this money was given to the Debtor to pay the household bills and other community expenses. No credible explanation was given as to why these checks were not made out directly to third parties. This is indicative of the intent to utilize the jewelry and funds as community property.

71. The Defendant produced no documentary evidence showing the Debtor's use of these funds. The checks themselves indicate that they were endorsed "for deposit only," and were deposited into an account at MBank.

72. Although the records of all accounts into which the Debtor and the Defendant deposited funds during this period were sought in discovery and subpoenaed for trial, the only records produced were the incomplete records of the Defendants' account at NCNB bank.

73. The Defendant admitted that her supposedly separate property funds from this account were paid to the Debtor without any agreement as to repayment or other understanding that would preserve the value of her separate property.

74. All of the checks written on this account were entirely in the Defendants' handwriting, with the exception of the two checks deposited by LFAI and LAI. The payee on both of these checks was left blank when the checks were written. Check number 1026 for \$1,000, dated July 23, 1990 is the check relied on by the Defendant as the source of her ownership in LAI.

75. The Defendant agreed at her deposition that she likely signed the first check in blank and the payee was filled in by someone else afterwards. As to the second check, the Defendant testified that she might possibly have been the one to type the payee's name on a typewriter after filling in the rest of the check by hand. Her explanation was that the rest of the checks were "personal," but that this was "business." This testimony lacks credibility since the first "business" check was done entirely by hand, and if she desired a more business-like appearance for the second check, she would presumably have typed it in its entirety. In any event, the circumstantial evidence and the logical inferences therefrom are that both checks were signed in blank and filled in by someone else.

The Defendant's Last Minute Evidence

76. At approximately 5:30 pm on the Monday before the start of trial at 9:30 am Wednesday, the Defendant provided the Trustee's counsel with an Amended Witness List and Exhibit List. Pursuant to the Court's Order, the parties were required to exchange witness and exhibit lists by 5:00 pm on July 2. Both parties had timely exchanged such lists.

77. The Defendant's untimely eleventh hour amended list sought to introduce documents related to the alleged sale of jewelry that had not been previously identified, and to call a previously unidentified witness who allegedly had purchased jewelry from the Defendant.

Significantly, the identity of such a witness and the existence of such documents were not only omitted from the required witness and exhibit lists, but had not been disclosed in response to specific discovery requests of the Trustee for such information. Indeed, as noted above, during discovery, the Defendant repeatedly represented that she either did not know or could not recall the identity of any person to whom jewelry was sold, and was unaware of the existence of any documents related to the sale of her jewelry.

78. The Defendant claimed that the identity of the witness and the existence of the documents were only discovered by happenstance at the last minute. This is not credible. Although conceding that the documents (including documents identifying the name of the witness) were in their possession all along, the Defendant alleged that she and her counsel did not realize that they had these documents until the Monday before trial. These facts were fabricated just prior to trial.

79. The Trustee moved to exclude the last minute witness and documents. Initially, the Court granted the motion, but on reconsideration admitted the documents and permitted the witness to testify. In so doing, the court did not rule that the documents or witness were credible or what weight would be given to them. Rather, the Court merely elected to hear and view all the evidence so that this evidence could be evaluated, considered and given the weight it deserved. Being a fabrication, the evidence is not credible.

80. According to counsel for the Trustee, prior to her proffer of this newly discovered evidence, the Defendant had not produced any documentary evidence to support her claim that the source of funds in the NCNB account was the sale of jewelry. As discussed in further detail below, while the newly discovered evidence on first glance appears to lend some circumstantial support for Defendant's claim, a closer examination of the evidence raises more questions than it answers. Indeed, in many respects, these documents support Trustee's position in this matter. In those areas where the documents appear to support the Defendant's position, they are hearsay and cannot be considered for the truth of the matter asserted therein.

81. The evidence adduced at trial also raised serious questions about the credibility of the Defendant's explanation for the last minute discovery of the documents and the identity of the jeweler-witness. Lindsey conceded that documents were found in a file cabinet that was on the opposite side of the room from the files that he was looking for when he supposedly stumbled on the documents. Moreover, the documents were contained in a file related to

litigation against the Debtor that had been handled by the same lawyers representing the Defendant in this case. Presumably these lawyers were well aware (or should have been) of the existence of this material all along.

82. Defendant's Exhibits 8 – 12 are documents that the Defendant claimed were found in a file related to discovery in unrelated litigation. Contrary to the Defendant's implication, the documents which reference the items of jewelry at issue in this case (i.e. the jewelry supposedly sold to fund the NCNB account - exhibits 8 and 11) were NOT part of the discovery response in that litigation. Lindsey admitted that he could not say that these documents were ever part of any discovery response. Indeed, no witness was able to properly authenticate or even identify these documents other than to state where they were found in the files.

83. Exhibit 8 is a handwritten list of jewelry prepared by Loftin, the Debtor's secretary. Loftin, however, had absolutely no recollection of preparing this document and could provide no explanation for when or why it was prepared. Importantly, she did confirm that she is not, and never has been, in the business of preparing inventories of jewelry and that the preparation of this document would have been an unusual thing for her to do. This document does not qualify under the business record exception to the hearsay rule.

84. The additional notations on exhibit 8, which were identified as the handwriting of the Debtor are even more irregular. These interlineations were added sometime after the document was prepared, but neither the Debtor nor any other witness provided any explanation for the notations or when they were made. This document is hearsay, missing any of the indicia of reliability required to consider it evidence of the truth of any of the matters asserted therein.

85. The Defendant's Exhibit 11 is equally unusual. It is a white piece of paper with typed notations that purport to establish that four pieces of jewelry were "sold through Broker (Mark Pharo)." No further identification is on the document. Neither its author nor its date of preparation is known. No witness was able to identify or explain the document. It is hearsay, missing any of the indicia of reliability required to consider it evidence of the matters asserted therein.

86. The Defendant's Exhibits 13 – 16 were produced by Mark Pharo ("Pharo"). The last minute circumstances surrounding the production of these documents raise serious questions about their completeness and reliability, in addition to Pharo's credibility.

87. The Defendant's Exhibit 13 is a ledger which purports to show that a check for \$145,000 was paid to the Defendant on May 15, 1989. This ledger appears to contain many indicia of irregularity, however, which raise serious questions about its reliability. First, the document contains 25 entries, all of which, with the exception of the first two, are in the handwriting of a bookkeeper. The entry relied on by the Defendant in this case is one of these first two entries and is in the hand of Pharo. Second, the ledger reveals an extraordinary coincidence - the transaction purporting to show the check to the Defendant was on the very day that the account was opened. Third, the dates of the entries in the ledger are partly out of chronological order. In fact, the page before the one on which the entry related to the Defendant appears contains entries from the following day.

88. Incredibly, Pharo testified that he was able to locate his financial records from fourteen years earlier within minutes of an "out-of-the blue," late afternoon call from the Defendant's counsel on the Monday before trial. Although Pharo's records were organized enough to locate these records on a moment's notice, he was unable to find any record of the \$145,000 cancelled check represented by the entry on his ledger.

89. Pharo attempted to explain why the transaction with the Defendant appears on the very first day of his corporate account. In doing so, Pharo gave conflicting and inconsistent testimony. On the one hand, he testified that this new account was opened because he had a large CD that was maturing at NCNB. On the other hand, he explained that he had just consummated a large sale, the proceeds of which represented the opening balance of this new account.

90. Pharo initially denied that he was in financial distress during the late 1980's at the time of his alleged \$145,000 transaction with the Defendant. Ultimately, he acknowledged that his business was affected by the downturn in the late 1980's and that by the early 1990's, he had placed his companies in bankruptcy and also had to file for personal bankruptcy. During this same time, he was sued repeatedly, and was indicted for grand theft.

91. Pharo testified that in May 1989, just prior to the time he allegedly purchased the three pieces of jewelry for \$145,000, his bank account was overdrawn and he could not afford to purchase the items of jewelry outright, opting instead to act merely as a broker. According to Pharo, he made a large sale and was then able to buy the jewelry (which he had previously

agreed to try to sell for them for \$170,000) outright for \$145,000. He made no showing of such a large sale.

92. The business transaction described by Pharo, however, does not make business sense. Presumably, Pharo would have been entitled to a substantial commission if he had sold the jewelry for \$170,000. Since he had limited financial resources at the time, it is not logical that he would agree to pay \$145,000 outright (which represented approximately 93% of the money he had in his account) unless he had a buyer or buyers already lined up. Pharo acknowledged that his business objective was to resell the jewelry in “5 minutes” if possible. However, there was no such immediate buyer.

93. Pharo did not produce any records proving the sale of any of the jewelry he supposedly bought from the Defendant. He testified that he looked for such records and could only find a record consistent with a sale of one of the pieces, and that was over seven weeks later. He did not bring these records to trial, but referred to an entry in his ledger which he believed probably represented the proceeds of such sale. This is not credible. As to the approximately 22 carat diamond he supposedly purchased, he was unable to find any record that he had ever sold it.

94. Although Pharo confidently recalled the \$145,000 transaction with the Defendant, he had no recollection of a \$200,000 or a \$350,000 transaction that same day.

95. Pharo was not a credible witness. He was not forthcoming in his testimony and his testimony was tainted by obvious bias in favor of the Defendant. His documents are suspect.

96. Pharo’s bias manifested itself in his testimony and demeanor, as well as his actions prior to his testimony. He made himself available to speak to counsel for the Defendant on multiple occasions prior to trial. He met with counsel for the Defendant at his office and allowed him to review his files. He was unavailable for the Trustee’s counsel. Pharo obviously was aware that he was a surprise witness as he admitted that he knew Trustee’s counsel might be calling. According to Pharo, however, he was out of his office for most of the day before the trial taking his family to the airport. Somehow he had the time to meet with the Defendant’s counsel in his office that day.

97. Pharo admitted that the documents he brought with him to Court came from a file that contained other documents related to the Tomlins. He initially gave untruthful testimony

about these other documents, stating that the documents related only to the Tomlins' earlier purchase of jewelry from him. The testimony on this point was as follows:

Q. You have a file on the Tomlins?

A. Yes.

Q. Did you bring that file?

A. No. Not the entire file.

Q. What else is in that file?

A. There's some purchases that the Tomlins made from me and I believe that's all.

98. In fact, on cross examination, Pharo admitted that these other documents included documents related to the sale of a watch by the Tomlins to him for \$17,000 in March 1989. According to Pharo, he was told by the Defendant's counsel not to bring these documents to court since the check for this watch was made payable to the Debtor and not the Defendant.

99. The Defendant's own documents establish that this watch was a ladies' watch. This evidence contradicts the Defendants' position that all the ladies' jewelry sold to Pharo belonged to the Defendant as her separate property. Pharo's participation in this conduct is another indication of his bias, and his patent attempt to aid the Defendant and the Debtor.

100. Pharo's testimony about the watch he purchased from the Debtor for \$17,000 was misleading at best. In his testimony, Pharo stated that he was not sure, but strongly implied that this was a man's watch, presumably to explain why he made the check out to the Debtor. Pharo admitted that he had just reviewed his documents related to this transaction and therefore must have known the true facts. This attempt to slant his testimony in a manner to support the Defendant's position is yet another indication of his bias.

101. The Debtor also claimed that the watch he sold to Pharo was a man's watch. When confronted with the fact that Pharo's records indicated that he was paid only \$17,000, the Debtor admitted that this must have been a ladies' watch since his watch was more valuable.

102. Exhibit 14 purports to be an invoice reflecting the purchase of three pieces of jewelry from the Defendant. The most significant item on this document, however, supports the Trustee. The notation "Per Dan" appears next to the amount of \$145,000, indicating that Pharo understood that he needed the Debtor's approval for the transaction. That notation indicates that the Debtor and the Defendant considered all their expensive jewelry to be community property.

103. That the items of jewelry allegedly sold to Pharo were understood by all parties to be community property is also supported by the Defendant's Exhibits 15 and 16. Both of these

exhibits are insurance appraisals prepared when the jewelry was purchased. According to Pharo these documents were given to him by the Defendant. They contain a representation that the items of jewelry being described are “the property of Mr. and Mrs. Daniel Tomlin.”

104. These insurance appraisals were prepared for the purpose of protecting the economic interests of the owner of the described jewelry. Accordingly, the parties had every reason to provide accurate information about the identity of the owner. As they were prepared prior to the time of any dispute, these documents are reliable evidence as to the true nature of the ownership of the jewelry.

105. The Debtor gave contradictory testimony about the sale of the jewelry. At his deposition, he insisted that he was not involved at all in the sale of the Defendant’s jewelry. According to the Debtor, all of these sales were handled by Tomlin III. At trial, the Debtor admitted that he did indeed assist the Defendant in the sale of the jewelry.

The Defendant’s Lack Of Evidence Of Donative Intent

106. The Defendant claimed that all of the items of jewelry allegedly used to fund her NCNB account were gifts from the Debtor. Since it is undisputed that these items were purchased during the marriage with community funds, they too must be deemed to be community property absent “clear and convincing evidence to the contrary.” As discussed in further detail, the Defendant has the burden of proof on this point as well.

107. The Debtor failed to provide any credible evidence of his donative intent to transmute by gift his hundreds of thousands of dollars worth of community property into the separate property of the Defendant.

108. The Defendant had no source of income during her marriage other than the Defendants’ earnings, which is community property.

109. The Defendant testified that both she and the Debtor purchased hundreds of thousands of dollars of jewelry for themselves during their marriage. The Court infers that the Debtor and Defendant’s purchase of such expensive jewelry was intended as an investment by the community in order to keep the funds out of reach of creditors in the event of litigation or demand for collection.

110. The Debtor had several pieces of expensive men’s jewelry, including several expensive diamond watches, diamond cufflinks and diamond studs. The Defendant acknowledged that she did not consider these items as gifts to the Debtor.

111. The Debtor admitted that, with the exception of the 22 carat diamond ring, a cubic zirconium replica of that ring, and a pearl necklace, he had no specific recollection of any other item of jewelry he gave to the Defendant.

112. The Debtor could not recall any item of jewelry he gave to the Defendant that cost more than \$50,000.

113. With respect to the two expensive necklaces allegedly purchased by Pharo and used to fund the NCNB account, the Debtor admitted that he had no specific recollection of either of these pieces of jewelry at all.

114. In fact, even after being shown an itemized list of jewelry, which included the items allegedly sold to Pharo, the Debtor admitted, "it doesn't ring any bells."

115. The most expensive piece of jewelry at issue in this case is a platinum and diamond necklace purchased for about \$65,000, a necklace the Debtor admits he has no specific recollection. The Debtor testified that he did not like platinum jewelry. It is not credible that Tomlin would purchase a \$65,000 platinum necklace for the Defendant as a gift, a gift he does not like because it is platinum, and then have no recollection of having done so.

116. There is no evidence that the Debtor was a generous gift giver to the Defendant. In fact, the evidence is to the contrary. The Defendant testified at her first deposition (before she changed her story from inheritance to gifts of jewelry) that she receives only nominal gifts from her family. At trial, she acknowledged that she hasn't received any gifts of jewelry from the Debtor for "so long I don't remember." It is not credible that the Debtor, who gave hundreds of thousands of dollars of jewelry to the Defendant in the 80's, would not give his her any jewelry for so long. This is particularly the case since the Debtor and the Defendant are again living a lavish lifestyle. For example, they live in a two million dollar home that they purchased in 1998, the Debtor's hobbies include racing Mazda racecars, and since 1998, the Debtor has received over three quarters of a million dollars in back wages as well as substantial compensation of approximately \$500,000 per year since 1998.

117. Circumstantial evidence tends toward the conclusion that, at least as of the date of the alleged sale to Pharo in May 1989, the diamond either did not exist or was merely a loose stone considered as an investment for the marital community, not the Defendants' separate property.

a. Pharo's testimony that his notations on his invoice indicate that the diamond he purchased was a loose stone, not set in a ring as described by the Defendant, gives support to its characterization as an investment.

b. Pharo testified that he had little if any independent recollection of this stone.

118. The evidence demonstrated that the Debtor and the Defendant played fast and loose with the concept of a "gift." The Debtor testified that he gave the Defendant two Rolls Royces. The Defendant testified, however, that she could remember no expensive gift other than jewelry. When confronted with the Debtor's testimony that she had been given two Rolls Royces as gifts, she expressed surprise. The Defendant did not consider that the car she drove was a "gift." Until it was sold, the title to the car was in the name of the Debtor. The only other Rolls Royces were titled in the name of the Company.

Alternative Sources Of Funding For The NCNB Account

119. Prior to trial, the Defendant and the Debtor took the position that the funds in the NCNB account had to have been from the sale of the Defendant's jewelry, since they had no alternative source of funds at the time. The evidence adduced at trial, however, was to the contrary.

a. The Debtor owned a 1987 Rolls Royce Corniche in his own name (the car driven by the Defendant), which he purchased in April 1987 for \$168,000 with a \$90,000 loan. The Debtor admitted selling this car, but claimed not to recall when or where it was sold. The file containing the records for this car was found and produced, along with the records of other Rolls Royces, including the records of another 1987 and a 1985 Rolls Royce titled in the company name. The contents of the file relating to the car titled in the Debtor's name, however, were inexplicably missing. The records of the Texas and Florida Departments of Motor Vehicles establish that the car was sold a few weeks before the opening of the NCNB account.

b. The Debtor testified that all of his commission and bonus compensation would typically be run through his company and be reflected on his W-2 compensation. He claimed to recall no instance where he received commissions or fees directly in his own name. His 1989 tax return, however, revealed that he received approximately \$70,000 of "other income" not reported on his W-2, in the form of commissions and

director's fees during 1989, the year the NCNB account was opened. This contradicts the Debtor's testimony that he needed to sell items so as to have money to purchase groceries.

**The NCNB Account As Part Of The Debtor's Continuing Plan
To Conceal His Assets In The Name Of His Family And Associates**

120. The NCNB account was opened in the name of the Defendant as part of a continuing plan to use his family and associates to hold the Debtor's assets in their own names. In this way, the account could function as a vehicle to make it appear like what it is not - that the account was a simple separate property account - when in fact it was a shield to keep property from creditors.

121. The Trustee adduced substantial direct and circumstantial evidence proving the existence of this plan, including evidence demonstrating the Debtor's repeated willingness to mislead the facts about his assets held by others.

a. In 1989, at around the same time the NCNB account was opened, the Debtor participated in the creation of a bogus bill of sale in order to make it appear that his mother owned antiques that were really his. This fits the pattern as described above.

b. In the late 1980's and continuing throughout the 1990's, the Debtor placed hundreds of thousands of dollars into an account in Loftin's name. Until 1995, these funds were kept in the same account that Loftin used for her personal purposes. The Debtor's name did not appear on the account and he had no signature authority. Starting in 1997, a separate account was opened only for the Debtor's money. The Debtor's name also did not appear on this account, nor did he have signature authority.

c. On multiple occasions during 1996 and 1997, the Debtor submitted sworn financial statements to the Department of Justice and the probation department. In these statements, he concealed the existence of the Loftin accounts. In addition to asking about the existence of bank accounts and other assets generally, each of these statements asked the direct question: "Is anyone holding money on your behalf?" Each time, the Debtor swore that the answer was "No." This indicates his continued obfuscation to conceal facts.

d. The Debtor's submissions to the Department of Justice included statements submitted in 1997 in connection with his attempts to negotiate a discount on

his criminal restitution penalty owed to the FDIC. On his behalf, the Debtor's criminal counsel was arguing for a discount on the ground that "it is unlikely that [the Debtor] will be in a position now or in the foreseeable future to make a significant payment to the FDIC." At the same time, a substantial amount of earned bonuses and "back wages" were being held on the Debtor's behalf by Lindsey in the accounts of LAI. The Debtor omitted this material asset on sworn financial statements submitted in connection with these negotiations.

(1) Beginning in the summer of 1997, all of the long-time employees of LAI (with the exception of the Debtor), began receiving substantial bonuses and "back wages" as a result of two very large commissions (totaling approximately two million dollars received on June 27, 1997 and July 29, 1997). The Debtor was also due bonuses and back pay at this time, but his was "accrued" so as to shelter the funds from creditors.

(2) In December 1997, the Debtor concluded negotiations with the Justice Department for an approximately \$200,000 discount on his \$300,000 criminal restitution penalty based on his financial inability to pay more. The Debtor utilized letters from friends as "window dressing" to make it appear that he needed to borrow from friends to pay even this compromise amount. In fact, the Debtor knew at the time that LAI was holding substantial bonuses and back wages on his behalf and that he actually had the ability to pay his restitution in full.

(3) The \$100,000 compromise payment was paid by LAI on the Debtor's behalf by a cashier's check dated December 24, 1997. LAI booked these funds as \$176,829 compensation to the Debtor (i.e. \$100,000 plus withholding taxes), but did not record this compensation until a few days into 1998. Neither the Debtor nor Lindsey could provide any explanation why the Debtor was treated differently from other employees in this regard. Tomlin III's testimony was more to the point. He testified that he recalled that the reason the Debtor wasn't paid at the same time as everyone else had to do with his criminal restitution.

(4) A memo from the Debtor's criminal attorney to the Debtor indicates that the settlement negotiations were concluded "not a moment too soon." This reveals the parties' knowledge that the Debtor's concealment about his ability to pay would likely be uncovered unless the transaction was completed before the end of 1997. Within a few months of settling his criminal restitution penalty, the Debtor applied for a loan for a million dollar home indicating that he would use a bonus from LAI as the source of a more than quarter of a million dollar down payment. He closed on the purchase of this loan shortly thereafter.

e. The Debtor drives a red Ferrari that is titled in the name Tomlin III. The Ferrari is garaged at the Debtor's home. According to Tomlin III, it didn't fit in his garage.

Missing Documents

122. Insurance Documents. The Defendant testified during her deposition that insurance documents related to her jewelry existed. No such documents were ever produced. These documents would likely provide substantial probative evidence as to the true ownership of the jewelry. The fact that the documents were not produced leads to a negative inference that they would not support the Defendant's position. The two insurance appraisals that were found in Pharo's files indicate that the two expensive necklaces he allegedly bought were the "property of Mr. and Mrs. Daniel Tomlin."

123. Copies of checks. Despite the substantial opening deposit into the NCNB account, the Defendant did not retain a copy of the deposit or other record of the source of funds in the account. Coincidentally, despite the ready availability of other financial records from the same time period, Pharo did not have a copy of the cancelled check either.

124. Bank records. Loftin testified that she intentionally destroyed all of the bank records relating to the funds she held on the Debtor's behalf prior to 1995. In addition to the Loftin account, the Trustee requested in discovery and by trial subpoena, the records of all bank accounts into which the Debtor or the Defendant deposited funds. However, with the exception of the NCNB records (which themselves were incomplete), no other such records were ever produced. Yet, other accounts existed since the checks made payable to the Debtor from the NCNB account reveal that they were deposited into an MBank account.

a. Loftin testified that she destroyed these documents as part of her policy of destroying documents every three or four years. The Debtor testified that he was unaware to this day that Loftin had destroyed these records. This testimony is not credible.

b. Loftin's bank account records were also the records of the Debtor since all of the Debtor's deposits and disbursements had been deposited in her account. Loftin was a long-time, loyal employee of the Debtor who would not be expected to destroy important records of her employer without his permission or instruction.

c. The selective destruction of these records was not based on any genuine retention policy. Many files from this same time period were kept and made available in discovery. That these sensitive financial records were destroyed is troubling since Loftin and the Debtor knew or should have known that the records were evidence in various pending or potential legal proceedings involving the Debtor's financial affairs. Since the late 1980s, and at all times when these documents were destroyed, the Debtor was subject to millions of dollars of judgments. He has been a party to many lawsuits, including various post judgment collection proceedings. He was the subject of federal subpoenas, including subpoenas requesting information about bank accounts, and he was a party to criminal restitution negotiations based on his financial inability to pay, and, at least until December 1997, was subject to probation requirements that he provide financial information to the government.

125. The incomplete NCNB records. During her first deposition, the Defendant indicated that she did not have a copy of documents related to her separate property account, explaining that the originals of these records had been taken from them some time ago "by the government" and that she did not retain copies. The Defendant finally produced the records of her bank account more than a year after they were requested.

a. At her second deposition, the Defendant explained that she did not realize that she had the records all along until the Debtor found them in a drawer at home sometime in January 2003, while cleaning out a closet. She refused, however, to reveal the conversations with the Debtor at that time on the grounds of Husband-Wife privilege. To this date, however, the bank records produced by the Defendant are still not complete.

Indeed, the records for the period March 14, 1990 to April 10, 1990, the period just a few weeks before the incorporation of LAI are missing.

b. During her deposition, and at trial, the Defendant claimed that she was unaware that there were records missing from her bank account. This testimony strains credulity and appears deliberately untruthful. The Debtor's counsel acknowledged at the deposition that he was well aware of the missing records. At trial, Lindsey confidently recalled that there had been an attempt to locate the missing records and that he had talked directly to the Defendant about the missing records before her second deposition.

c. The Defendant has provided no explanation for the missing month. What is undisputed is that the records were found and examined first by the Debtor before being produced in this case. The missing month also includes at least one missing check (#1020). It is lausible, and probably more plausible given the inconsistencies in the witnesses' testimony on this point and the Defendant's demonstrated pattern of attempting to withhold adverse evidence, that the missing records are not as innocuous as implied by the Defendant. The records of the following month would, for example be mathematically consistent with a transaction that included a deposit of substantial funds in the account which were then withdrawn either through the missing check or otherwise. This is the pattern of the Debtor's use of his family and employees and business entities to do business as usual in a fictional setting.

CONCLUSIONS OF LAW

126. In order to prevail in this case, the Defendant had an obligation to prove her case by "clear and convincing evidence." To do so, she had to show a chain of convincing proof tracing her ownership of LAI to unambiguously separate property. If her evidence fell short with respect to any single link in this chain, the presumption of community property would require a finding for the Trustee. In fact, her evidence was unconvincing with respect to every single link in the chain.

127. The Defendant did not prove by clear and convincing evidence that the funds in the NCNB account were from the sale of jewelry. The best evidence of this fact - a copy of the deposit check - was not produced by either the Defendant or the supposed buyer. The Court infers from the time between the date of her opening deposit and the date on the alleged transaction documents of Pharo produced at the last minute that the events did not transpire as

portrayed. As demonstrated above, there are significant questions and suspicions about the credibility of these documents. These suspicions are heightened further by the refusal of Defendant to reveal her discussions with the Debtor about this account on the ground of Husband-Wife privilege. The suspicions are heightened even further by the fact that the Defendant and her counsel insisted repeatedly for over two and a half years that the source of funds in the account was inheritance. These repeated contradictory prior statements are, in and of themselves, sufficient reason to conclude that the Defendant has failed to meet the clear and convincing evidence burden of proof in this case. The statements in the Defendants' pleadings regarding the derivation of funds as from "inheritance" is an admission contrary to her position at trial.

128. The Defendant did not prove by clear and convincing evidence that the specific jewelry sold to fund the account was intended by the Debtor to be a transmutation of community property by gift.

129. The credible evidence is that the Defendant "acquired" her ownership almost two months before she wrote check number 1026 for \$1,000 - the sole basis of her claim in this case. The overwhelming evidence is that she acquired her ownership in LAI not as a result of this nominal payment of \$1,000, but because of the fiction portraying a transaction that was not true. This was planned by lawyers to defeat creditors.

130. The Court concludes from the overwhelming evidence that the jewelry to stock transaction was a sham and that the Defendant is holding her interest in LAI as a mere nominee for her the Debtor. Neither the Defendant nor her children have acted in a manner consistent with their position as genuine controlpersons (shareholders) of LAI.

**The "Clear And Convincing Evidence" Standard
Required To Rebut The Presumption Of Community Property
Is A Heightened Standard Of Proof Which Defendant Did Not Meet**

131. The presumption that property acquired during marriage is community property has been characterized as "strong." *See Rogers v. Rogers*, NO. 14-00-00077-CV, 2001 WL 1013405, *3 (Tex.App.-Hous. [14 Dist.] Sept. 6, 2001, pet. denied) (not designated for publication). In order to rebut this presumption, "clear and convincing evidence" is required. This standard of proof has been codified into law by the Texas legislature. Pursuant to the Texas Family Code:

- (a) Property possessed by either spouse during or on dissolution of marriage is presumed to be community property;
- (b) The degree of proof necessary to establish that property is separate property is clear and convincing evidence.

TEX. FAM. CODE ANN. § 3.003 (Vernon 1998).

132. “Clear and convincing evidence” is defined by the Texas Family Code as:
[T]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

TEX. FAM. CODE ANN. § 101.007 (Vernon 1999).

133. The legislature has provided for a heightened standard of proof in cases such as this - somewhere between the general civil standard of “preponderance of the evidence” and the criminal standard of “beyond a reasonable doubt.” *See McPhee v. IRS*, No. Civ.A. 300CV2028D, 2002 WL 31045978, *1 (N.D.Tex. Sept. 19, 2002) (“clear and convincing evidence . . . is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings”); *see also In re Marriage of Baggett*, No. 07-02-0087-CV, 2002 WL 31114964, *2 (Tex.App.-Amarillo Sept. 24, 2002, no pet.) (not designated for publication) (“proof must weigh heavier than merely the greater weight of the credible evidence”).

134. As the trier of fact, the Court’s decision in this case must be based on its examination of all the direct and circumstantial evidence in context, its observations the witnesses demeanor, and its conclusions as to the credibility of the witnesses.

135. As the court explained in *Baggett*:

As the factfinder, the trial judge was the exclusive trier of fact. He was free to consider all, part or none of a witness’s testimony. . . . In evaluating the credibility of Larry’s testimony, the trial court could also consider the absence of documents supporting such a relatively large transfer of money, as well as the timing of the purchase of the instrument.. . [also] . . Even though uncontroverted, Larry’s testimony concerning the stock split was indefinite and did not meet the clear and convincing standard. His argument concerning the mathematical consistency of a three for one split of his separate property stock during the marriage is persuasive, but standing alone is simply not sufficient to overturn the community property presumption . . . This type of uncorroborated evidence falls short of meeting the clear and convincing standard and we cannot fault the trial judge in arriving at his obvious conclusion that the testimony was not sufficient to overcome the community property presumption.

2002 WL 31114964, at *3; *see also Miller v. Miller*, No. 05-01-01844-CV, 2002 WL 31410965, *3 (Tex.App.-Dallas Oct. 28, 2002, reh'g filed) (not designated for publication) ("Mere testimony that property was purchased with separate property funds, without any tracing of the funds, is generally insufficient to rebut the presumption."); *Gaides v. Gaides*, No. 14-99-00172-CV, 2001 WL 460049, *6 (Tex App.-Houston [14 Dist.] May 3, 2001, pet. denied) (not designated for publication) ("Patricia testified that the stock was first purchased by her in October 1969 with funds from both the proceeds of a car Patricia owned before marriage and 'gifting money' from Patricia's mother and grandmother. Patricia's testimony alone, however, is insufficient to rebut the statutory presumption that the shares are community property."); *Brehm v. Brehm*, No. 14-99-00055-CV, 2000 WL 330076, *3 (Tex.App.-Houston [Dist 14] Mar. 30, 2000, no pet.) (not designated for publication) (where "the only testimony presented by Ralf that this CD was his separate property was his own testimony" the court found this did not shift the burden as it was not clear and convincing evidence that the property was separate); *Huddle v. Huddle*, No. A14-84-423-CV, 1986 WL 9866, *3 (Tex.App.-Houston [Dist. 14] Aug 28, 1986, no pet.) (not designated for publication) ("[T]he trial court was entitled to disbelieve Mrs. Huddle's testimony.")

136. In *Cure v. Krottinger*, the defendant, wife of a debtor in bankruptcy, claimed that a condominium was purchased with her separate property. No. 7:00-CV-0027-R, 2001 WL 258619 (N.D.Tex. Mar 12, 2001). As in this case, the defendant claimed that the funds she used to purchase the condominium were drawn on her separate property bank accounts, funded with money from an inheritance from her mother. *Id.* Notwithstanding the presentation of an uncontroverted affidavit and a deposit slip on which defendant had written her mother's name, the court found summary judgment inappropriate thereby acknowledging that a finding for the trustee might be appropriate at trial. *Id.* As the court explained:

[T]he Defendant failed to provide clear and convincing evidence that her separate property was used to make the above-described payments. . . . Under Texas law, property acquired during the marriage is presumed to be community property and the degree of proof necessary to establish that property is separate is clear and convincing evidence. . . . Additionally, Texas courts hold that "the testimony of an interested party, when not corroborated, does not conclusively establish a fact even when uncontradicted." . . . Here, Defendant alleges that the money . . . came from a distribution from her mother's estate. However, the only evidence offered in support of this allegation is the Defendant's own affidavit and a bank deposit slip on which Defendant wrote her mother's last name. This uncorroborated

evidence is not sufficient for this Court to grant summary judgment, even in the absence of contradicting evidence. . . . Here, we have only the Defendant's uncorroborated testimony that the money was given to her as a gift from her mother's estate.

Id at *2-4 (internal citations omitted); *see also Scott v. Estate of Scott*, 973 S.W.2d 694, 695 (Tex. App.-El Paso 1998, no pet.) (“The characterization of property as separate or community, if disputed, is a question of fact for the fact finder.”); *Asberry v. Fields*, 242 S.W.2d 241, 242 (Tex.Civ.App.-Eastland 1951).

137. Indeed, because of the strong presumption in favor of community property, in a case where documentary proof tracing the source of funds was lacking, one court saw fit to enter a judgment notwithstanding the verdict in favor of the community property status of property, where the testimony about the “separate” source of funds was “vague and contradictory.” *See Rogers*, 2001 WL 1013405, *3 (“Ann’s contradictory, vague and equivocal testimony, without more, was insufficient for a reasonable jury to determine under the clear and convincing standard that the funds, at their inception, were her separate property. . . . Accordingly, we find that Ann has not met her burden to overcome the strong community property presumption”); *compare Hinsley v. Boudloche (In re Hinsley)*, 201 F.3d 638 (5th Cir. 2000) (affirming a summary judgment for bankruptcy trustee as to the community property status of property despite self serving and unsupported affidavits of both spouses to the contrary).

**Defendant Has Not Produced Credible Evidence
Tracing The Acquisition Of Her Stock To An Original Source
Of Separate Property; In Fact The Credible Evidence Points To The
Opposite Conclusion – That She Acquired Her LAI Stock Prior To The
Payment Of Any Funds, By Virtue Of The Debtor’s Contribution To The Company**

138. The Defendant must “trace,” by clear and convincing evidence, the acquisition of the subject property to the original source of the funds alleged to be separate property. It is not sufficient to trace the property to an intermediate source. *See, e.g., Tarver v. Tarver*, 394 S.W.2d 780 (Tex. 1965); *Garza v. Garza*, No. 04-99-00312-CV, 2000 WL 730605 (Tex.App.-San Antonio June 7, 2000, no pet.); *Bahr v. Kohr*, 980 S.W.2d 723 (Tex.App.-San Antonio 1998, no pet.); *Cure*, 2001 WL 258619.

139. When the dispute involves the interests of a creditor or third party (i.e. is not merely between the husband and wife), courts have taken a particularly stringent view of the requirement for clear and convincing evidence of tracing to the original source. In *Bahr* the

appellate court reversed the decision of a trial court, which upheld a husband and wife's claim that certain property was the wife's separate property, and not subject to claims of her creditor. 980 S.W.2d 723. In that case, the Bahrs had obtained an out of state judgment against Mr. Kohr. Id. The issue for the court was whether certain Texas property was community or separate property of the wife. Id. At trial, the only two witnesses were Mr. and Mrs. Kohr who both testified that the Texas property had been purchased with funds from the wife's separate property money market account. Id. Both also testified that the source of funds in that account was the wife's separate property share of the proceeds of the sale of certain New Jersey property. Id. Notwithstanding this testimony, and the trial court's finding that the property was indeed purchased with funds from the wife's separate property bank account, the appellate court held that the evidence was factually insufficient to support the court's verdict because there was no documentation tracing the source of the funds into the bank account. Id. As the Court explained:

'Mere testimony that property was purchased with separate property funds, without any tracing of the funds, is generally insufficient to rebut the presumption.' . . . The Bahrs contend that the Kohrs did not clearly trace Mrs. Kohr's separate property from the proceeds of the New Jersey farm to the purchase of the Gillespie County property. . . . In order to overcome the presumption by clear and convincing evidence, the Kohrs must trace and identify the funds used to purchase the Gillespie County property from Mrs. Kohr's half of the proceeds of the sale of the New Jersey farm. Mrs. Kohr's proceeds must be clearly traced to the money market account. . . . Thus, the Kohrs failed to trace, by clear and convincing evidence, Mrs. Kohr's proceeds of the New Jersey farm of presumably \$ 510,000 into the money market account. Proof that the money market account had a balance of \$ 705,834.57 on May 25, 1988 does not clearly trace Mrs. Kohr's proceeds from the sale of the New Jersey farm. Therefore, we find that the Kohrs failed to overcome the presumption of community property by clear and convincing evidence. Thus, the evidence was factually insufficient to support the court's finding that separate property was used to purchase the Gillespie County property.

Id at 730.

140. Similarly, in this case, even if the Defendant had established to the Court's satisfaction that she sold sufficient jewelry to fund the account before the date of the initial deposit, the Defendant has still failed to produce any credible documentary evidence proving that the source of money in the account actually came from the sale of that jewelry. *See Latham v. Allison*, 560 S.W.2d 481, 485 (Tex.Civ.App.-Ft. Worth 1977, writ ref'd n.r.e.) (holding that

spouse's testimony that money in bank accounts came from the proceeds of the sale of separate property stock was not sufficient to rebut the presumption of community property since "there [was] a total absence of evidence to show that the various accounts were actually funded with the proceeds from the sale of the separate stock" and "[w]hen tracing separate property, it is not enough to show that separate funds could have been the source of a subsequent deposit of funds").

141. On the other hand, the Defendant's own evidence establishes conclusively that she acquired her allegedly separate ownership interest in LAI before the date of the \$1,000 check she alleges was the source of payment for the acquisition of that stock. Thus, even if the Defendant had been able to carry her burden of proving that the source of all of the funds in the bank account were separate property, she would still be factually and legally unable to rebut the presumption of community property in this case. Her own evidence establishes that she acquired her interest without using any of these separate funds.

142. The Defendant has implied that the court should ignore the May 25 issue date for her shares and view the substance of the transaction as a purchase of stock on credit. This explanation, however, is contradicted by LAI's own bylaws, which prohibits shares of LAI from being issued on credit. A more accurate characterization of the substance of the transaction is that the stock was issued to the Defendant notwithstanding the non-payment of the nominal sum of \$1,000. The payment of the \$1,000 was inconsequential, a nominal amount, the only purpose of which was to attempt to retroactively establish a separate property status for property that was community property at its inception.

143. The Debtor's business relationships, profits interests in deals, commission rights, business contacts, and the \$333,000 commission from the "Fontana" deal, provided the real initial capitalization of LAI. The Debtor also had the ability to acquire stock in LAI with community funds if he so desired. Substantial evidence points to the fact that the new entities were organized and incorporated under the Debtor's direction, that the Debtor was the controlperson at the time, and that the Debtor made all the decisions as to who should own the stock.

145. Texas courts have stated that the question of the community or separate status of property must be determined as of the "inception of title." Moreover, the relevant time for determining "inception of title" is not when the property is ultimately paid for, or even when

legal title is ultimately acquired, but “when a party first has right of claim to the property by virtue of which title is finally vested.” *See Smith v. Smith*, 22 S.W.3d 140, 145 (Tex.App.-Houston [14 Dist.] 2000, no pet.) (holding that the date when a cause of action for damages accrued, not the date when the damages are ultimately paid, is the relevant date for determining whether the award was separate or community property).

146. The evidence establishes that the Defendant acquired her “right of claim” to her interest in LAI prior to the payment of any allegedly separate funds. Her subsequent, after the fact, payment for the stock, even with separate funds, would at most entitle her to reimbursement for the \$1,000 from the community estate. Moreover, the community nature of her claim to the stock could only be converted into her separate property with the acquiescence and agreement of her spouse. In this case, since the Debtor was unquestionably insolvent at the time, his acquiescence or agreement to permit the conversion of originally community property into the Debtor’s separate property would be ineffective as against prior creditors. *See Cure*, 2001 WL 258619; *Bahr*, 980 S.W.2d 723; *Hinsley*, 201 F.3d 638; *see also* TEX. FAM. CODE ANN. § 4.106.

**The Defendant Has Produced No Credible
Evidence, Let Alone Clear And Convincing Evidence,
That The Subject Jewelry, Which Was Purchased With
Community Funds, Was Intended As A Transmutation By Gift**

147. Given that the jewelry described by the Defendant was purchased by the Debtor during his marriage with community funds, the jewelry must be presumed to be community property unless the Defendant can produce clear and convincing evidence that the jewelry was a valid transmutation of community property by gift. The Court concludes these large purchases were investments in community property to shelter the monies for use in the future.

148. That the jewelry in this case was not intended as a gift of community property is supported by the Defendant’s own testimony at her first deposition. At that time she was asked about her source of funds generally and about gifts she received from family in particular. At no time during her testimony did she ever mention gifts of jewelry from the Debtor, let alone gifts of hundreds of thousands of dollars worth of jewelry. Rather, she described the typical gift as having nominal value. Indeed, notwithstanding the tremendous importance that the sale of this jewelry has become to her claim of separate property, she did not make a single reference to any gifts or sales of jewelry in the entire first deposition. *See, e.g., In re Sullivan*, 204 B.R. 919 (Bankr.N.D.Tex 1997) (where this Court found that the debtor failed to present clear and

convincing evidence to rebut the presumption of community property with respect to jewelry which the debtor alleged was his wife's separate property).

149. Additional factors exist tending to negate the fact that the jewelry was intended as a transmutation of community property into separate property by gift. First, the Defendant's own testimony and conduct in writing checks for expenses indicates that the vast majority of the proceeds of the sale of jewelry were given to the Debtor to be used for community expenses. Moreover, the Defendant conceded that these funds were paid to the Debtor without any agreement as to the repayment of her separate property or other understanding to preserve the value of her separate estate. It is the intention of the Debtor and the Defendant at the time of transfer, as determined by the facts and circumstances at the time, and contemporaneous documentation, which is most probative of whether there was a true gift. Testimony given for the first time during litigation has relatively little probative value.

150. Property received during the marriage as a true gift becomes separate property, and one spouse may give a gift of his or her community or separate property to the other spouse, transfers of property between spouses have a special character that must be analyzed differently than transfers and gifts from a non-spouse. In recognition of this fact, the Texas legislature has provided for certain formalities that must be followed in order to have a valid transmutation of community property. *See* TEX. FAM. CODE ANN. § 4.104 (Vernon 1998). The legislature has also provided a mechanism for spouses to avoid questions and uncertainties about the status of their property by recording a schedule of such property. *See* TEX. FAM. CODE ANN. § 3.004 (Vernon 1998). Neither the Debtor nor the Defendant has chosen to take advantage of the procedures of these statutes.

151. In this case, the Defendant claims that the Debtor gave her literally hundreds of thousands of dollars worth of jewelry. Yet the only evidence of the Debtor's donative intent is the after the fact, vague, and conclusory testimony of the Defendant and the Debtor. On the other hand, contemporaneous documentation and evidence such as the insurance appraisals (Exhibits 15 and 16), the reference to "Per Dan" on the Defendant's Exhibit 14, and the fact that the Debtor was paid directly for the sale of the ladies' watch all tend to establish that the jewelry was considered at the time to be a community property investment.

152. It is settled law that the burden of proving a gift is upon the party claiming under the gift. *Wells v. Ward*, 207 S.W. 2d 698, 700 (Tex.Civ.App.-Texarkana 1948, writ ref'd n.r.e.)

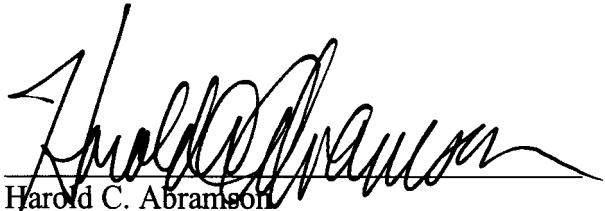
("One who asserts a gift has the burden of showing that the gift was made"). Absent a showing that the Debtor intended to make a gift of his community property interest to the Defendant, the Court will not presume a gift of the community property interest. *See Freedman v. United States*, 382 F.2d 742 (5th Cir. 1967).

153. Any finding of fact stated herein which is a conclusion of law shall be deemed a conclusion of law, and any conclusion of law stated herein which is a finding of fact shall be deemed a finding of fact.

Counsel for the Trustee shall submit a judgment consistent with these findings of fact and conclusions of law.

Signed this AUG 27 2003, 2003.

AUG 27 2003


Harold C. Abramson
United States Bankruptcy Judge
Northern District of Texas